

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, practices, and conduct of Pacific Bell Wireless LLC dba Cingular Wireless, U-3060, U-4135 and U-4314, and related entities (collectively "Cingular") to determine whether Cingular has violated the laws, rules and regulations of this State in its sale of cellular telephone equipment and service and its collection of an Early Termination Fee and other penalties from consumers.

Investigation 02-06-003
(Filed June 6, 2002)

**ADMINISTRATIVE LAW JUDGE RULING
RECEIVING FOUR ADDITIONAL LATE-FILED EXHIBITS**

On June 3, 2003, Commission's Consumer Protection and Safety Division (CPSD) filed a petition to reopen the record for the receipt of four additional documentary exhibits.¹ By e-mail to the parties that day, the assigned administrative law judge (ALJ) shortened time for responses, directing that any responses be filed by June 6. Cingular Wireless (Cingular) did not file a response. However on June 6, Cingular filed a motion asking that parts of two of the proposed exhibits be received under seal.

The proposed exhibits consist of certain market research and related correspondence. CPSD has submitted copies of the proposed exhibits to the ALJ

¹ *Second Petition of the Consumer Protection & Safety Division (CPSD) to Re-open the Evidentiary Record—for the Admission of Market Research not Produced Earlier by Cingular.*

and to Cingular and the Utility Consumers' Action Network, the two other parties, but has not filed them with its motion. CPSD states that it requested the market research by data request in July 2002, that it agreed not to compel the attendance of one of Cingular's employees at hearing based on Cingular's representations that the documents would be produced, and that the documents were produced over a period between May 8 and 28, 2003. Evidentiary hearings in this proceeding adjourned on April 11, 2003. Opening briefs were due on May 19 and reply briefs are due on June 16.

The marketing information at issue clearly is relevant and it was not available to CPSD for use at hearing. While some of the information may be cumulative of other evidence received, I will receive the proposed exhibits so that the parties may address their value as proof in their briefs. I will not require a clearer showing of materiality at this time, because doing so would serve to countenance Cingular's delay in producing discovery. The proposed exhibits will be received as Exhibits 49 through 52. All exhibits are identified in the ruling paragraphs and Exhibits 49 and 51 are further described in the discussion below.

Attached to Cingular's motion is the declaration of Clark Coles (Coles), its Executive Director for Marketing. Coles states that the public release of Exhibit 49, which consists of a market research report on the viability of "winback" offers prepared for Cingular by BI, a consulting firm, would cause competitive harm to Cingular "because its competitors would be given access to valuable marketing research results at no costs even though Cingular paid for the same results." (Coles Declaration, Paragraph 3.) Coles states that as far as he is aware, none of Cingular's competitors release such information. While Cingular asks the Commission to seal this document, in footnote 4 of the motion Cingular

concedes that redacting all but the page headings will provide adequate protection. This is the same way that the Commission has treated Exhibit 38.²

Exhibit 51 includes a list of “verbatim responses to an open-end ad recall question for Cingular’s ‘Spiderman’ ad campaign” prepared for Cingular by the Segmentation Company (tcs), another consultant; the responses are found on the third page [Bates # (LH) 0002]. (Coles Declaration, Paragraph 4.) Coles reiterates the same competitive concerns articulated with respect to Exhibit 49.

Cingular’s motion and the Coles declaration raise competitive concerns that were examined and addressed in the *May 12 Confidentiality Ruling*, which reviewed marketing and advertising research similar to that contained in Exhibits 49 and 51.³ The *May 12 Confidentiality Ruling* determined to adopt a cautious approach to release of marketing and advertising research (and certain other allegedly confidential information) in light of the Commission’s limited

² See *Joint Ruling of Assigned Commissioner and Administrative Law Judge on Confidentiality of Specified Exhibits*, dated May 12, 2003, Attachment A, p. 11 (*May 12 Confidentiality Ruling*).

³ The only difference here is that Coles explicitly states that neither BI nor TCS has consented to the public release of the information at issue—but Coles does not explain how this factors into an assessment of whether public release of the information would cause Cingular unfair business disadvantage. The *May 12 Confidentiality Ruling* observed that with respect to the documents at issue there, Cingular appeared to have made no attempt to obtain consent to disclosure from third-party vendors but was merely asserting that confidentiality agreements with those entities established another ground for precluding public disclosure of the documents. The *May 12 Confidentiality Ruling* rejected “Cingular’s contention that the alleged existence of a third-party confidentiality agreement, in and of itself, requires that the Commission seal all documents prepared for a regulated entity by that party.” (*May 12 Confidentiality Ruling* at p. 10.)

jurisdiction over wireless carriers and the competitive nature of wireless service and therefore “to retain under seal some information that that we would likely disclose given different regulatory or competitive regimes.” (*May 12 Confidentiality Ruling*, at 12.) There is no reason to depart from that approach here, and so the instant motion should be granted to the extent set out in the ruling paragraphs and should otherwise be denied.

IT IS RULED that:

1. The June 3, 2003 petition of CPSD to reopen the evidentiary record for the admission of 4 late-filed exhibits is granted and the following documentary exhibits are received in evidence, as further specified in these ruling paragraphs:

- (a) Exhibit 49. May 20, 2003 letter from Steefel, Levitt & Weiss and attached Renewal and Winback Offers Test – Final Report [Bates # (LH) 1666-1725].
- (b) Exhibit 50. May 19, 2003 Verification of Lisa Herndon and related April 11, 2003 Amended Declaration of Lisa Herndon.
- (c) Exhibit 51. May 8, 2003 letter from Cingular counsel inclosing April 30, 2003 from The Segmentation Company (tsc) and attached listing of “verbatim responses to the open-end question in the 2002 tracking survey in which respondents made reference to Spider-man ads” [Bates # (LH) 0001 and (LH) 0002].
- (d) Exhibit 52. May 28, 2003 letter from Cingular counsel inclosing May 23, 2003 letter from BI (Scheonecker, Inc.).

2. The June 6, 2003 motion of Cingular to file an maintain under seal Exhibit 49 and a portion of Exhibit 51 is granted to the extent specified in these ruling paragraphs and is otherwise denied.

3. Exhibit 49 shall be received under seal and a public version of the exhibit, which redacts all information except the title page [Bates # LH 1666] and the heading on each subsequent page, also shall be received. On or before June 16,

2003, Cingular shall provide a redacted copy of Exhibit 49 to the assigned administrative law judge so that it may be placed in the public file.

4. The third page of Exhibit 51 [Bates # (LH) 0002] shall be received under seal.

Dated June 10, 2003, at San Francisco, California.

/s/ JEAN VIETH

Jean Vieth
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Receiving Four Additional Late-Filed Exhibits on all parties of record in this proceeding or their attorneys of record.

Dated June 10, 2003, at San Francisco, California.

/s/ ELIZABETH LEWIS

Elizabeth Lewis

N O T I C E

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